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17 **UNITED STATES DISTRICT COURT**  
18 **CENTRAL DISTRICT OF CALIFORNIA**  
19 **SOUTHERN DIVISION**

20 McRO, INC., d.b.a. PLANET BLUE,  
21 Plaintiff,

22 v.

23 INSOMNIAC GAMES, INC.,  
24 Defendant.

Case no. CV12-10340 GW (FFMx)

**NOTICE OF MOTION AND MOTION  
TO DISMISS PLAINTIFF'S  
COMPLAINT;**

**MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: March 7, 2013

Time: 8:30 a.m.

Courtroom: 10

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**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on March 7, 2013, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom 10 of the above-referenced Court, located at 312 North Spring Street, Los Angeles, California, defendant Insomniac Games, Inc. (“Insomniac”) will and hereby does move this Court, pursuant to Federal Rules of Civil Procedure 12(b)(6), for an order dismissing the complaint of Plaintiff McRO, Inc. d.b.a. Planet Blue for failure to state a claim.

The grounds for this motion include that the complaint does not provide fair notice of the nature of the claims against Insomniac, as Rule 8 requires, nor does it provide a short-and-plain statement of facts sufficient to show a plausible right to relief, as required by the U.S. Supreme Court’s decisions in *Twombly* and *Iqbal*, regional Circuit precedent, and other authority.

The motion is based upon this Notice and Motion, the attached Memorandum of Points and Authorities, the pleadings and records on file in this action, and upon any additional evidence and argument that may be presented before or at the hearing of this motion.

The motion is made following a pre-filing conference of counsel pursuant to Local Rule 7-3, which began by email on January 30, 2013, and continued telephonically on January 31, 2013.

Dated: February 4, 2013

Respectfully submitted,

BENJAMIN L. SINGER

HOPENFELD SINGER RICE & SAITO LLP

STEPHEN RUBIN

LAW OFFICE OF STEPHEN RUBIN

By: /s/ Benjamin L. Singer

Benjamin L. Singer

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INSOMNIAC GAMES, INC.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

This motion *pro forma* joins the January 28, 2013 Motions to Dismiss filed by Konami Digital Entertainment, Inc. and Square Enix, Inc.

Plaintiff McRO, Inc. d.b.a. Planet Blue (“McRO”) has filed sixteen (16) nearly identical complaints in this district, claiming infringement of U.S. Patent Nos. 6,307,576 (“576 Patent”) and 6,611,278 (“278 Patent”) (collectively, the “Patents-in-Suit”) by videogame companies, including defendant Insomniac Games, Inc. (“Insomniac”).<sup>1</sup> The complaints are threadbare by even the most liberal pleadings standards. The only facts alleged are that the defendant videogame companies make, publish, sell “and/or” advertise unspecified “video and/or computer games.” The complaints then aver that this activity – “on information and belief” – somehow infringes the Patents-in-Suit.

McRO does not claim to have invented speaking animated computer characters, which are commonplace in the videogame market. The Patents-in-Suit are directed solely at specific methods and apparatuses for animating character lip movements or facial expressions by using a specific set of rules applied to transcriptions of recorded text. Yet the complaint pleads no facts to plausibly suggest that Insomniac is using the patented methods (or, if Insomniac were doing so, whether it is doing so through videogame development, sale of videogames, or other means). Taken as a whole, the complaints state nothing more than that it is possible for video game companies to infringe the asserted patents and that the defendants are video game companies. This “its possible you infringed” is not “fair notice.”

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<sup>1</sup> On November 21, 2012, McRO filed eleven (11) other virtually identical suits against different videogame companies in the District of Delaware.

1 Rule 8's requirements for providing "fair notice" to Insomniac of the nature  
 2 of the accusations require, at minimum, an identification of the games at issue and  
 3 the conduct in relation to those games that McRO contends is covered by the  
 4 asserted patents. The availability of discovery is no substitute for McRO meeting  
 5 minimal pleading standards: Insomniac has a right to basic information about this  
 6 case at the outset, including to permit an assessment of whether the correct party has  
 7 been sued, whether a third-party software is targeted, and for other reasons  
 8 implicated by the pleadings. McRO's complaint does not satisfy Rule 8's  
 9 requirements and should be dismissed.

## 10 **II. RELEVANT FACTUAL BACKGROUND**

11 Insomniac is an independent video game developer headquartered in  
 12 Burbank, California.

13 On December 4, 2012, McRO filed 16 complaints in this district against  
 14 Insomniac and other videogame companies. The sole "factual" allegation, repeated  
 15 in each complaint alleges:

16           Upon information and belief, Defendant, directly or  
 17           through intermediaries (including through retailers,  
 18           distributors and others), has acted and is acting to  
 19           develop, publish, manufacture, import, ship, distribute,  
 20           offer for sale, sell, and/or advertise (including the  
 21           provision of an interactive web page) various computer  
             and/or video games.

22           The Patents-in-Suit claim specific methods and apparatuses for animating a  
 23 computer character's facial expression, including lip movements, by applying a  
 24 certain set of rules to phonetic transcriptions of recorded text. (*e.g.*, '576 Patent, col.  
 25 11, lines 27-47.) The complaint, however, makes no reference to any use by  
 26 Insomniac of the specific methods or apparatuses claimed in the patents (*e.g.*, by  
 27 alleging use of a "phoneme" transcript or other methods claimed in the patents), nor  
 28

1 does it identify any specific digital products developed, made, sold or advertised by  
 2 Insomniac that allegedly use McRO's claimed methods.

3 During the pre-filing meet and confer, Insomniac explained that it needed, at  
 4 a minimum, an identification of the games and conduct at issue to understand the  
 5 scope of this litigation and how appropriately to respond. McRO declined to  
 6 provide any additional information.

### 7 **LEGAL ARGUMENT**

#### 8 **III. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO** 9 **PROVIDE FAIR NOTICE OF THE NATURE OF THE CLAIMS** 10 **AGAINST INSOMNIAC OR FACTS SHOWING A "PLAUSIBLE"** 11 **RIGHT TO RELIEF**

##### 12 **A. Legal Standards**

13 Rule 8 requires that a complaint contain a "short and plain statement of the  
 14 claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). If a  
 15 complaint fails to satisfy Rule 8, it "must be dismissed" under Rule 12(b)(6) for  
 16 failure to state a claim upon which relief can be granted. *Bell Atl. Corp. v.*  
 17 *Twombly*, 550 U.S. 544, 570 (2007). To survive a motion to dismiss, plaintiff must  
 18 allege "enough facts to state a claim to relief that is plausible on its face." *Id.*

19 The pleading must "give the defendant fair notice of what ... the claim is and  
 20 the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). "[A]  
 21 plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires  
 22 more than labels and conclusions, and a formulaic recitation of the elements of a  
 23 cause of action will not do." *Twombly*, 550 U.S. at 555. "While legal conclusions  
 24 can provide the framework of a complaint, they must be supported by factual  
 25 allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). These factual allegations  
 26 must be sufficient to push the claims "across the line from conceivable to plausible."  
 27 *Id.* at 680 (quoting *Twombly*, 550 U.S. at 557).



1 A motion to dismiss for failure to state a claim involves “a purely procedural  
 2 question not pertaining to patent law,” for which this Court applies “the law of the  
 3 regional circuit.” *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1355-56 (Fed. Cir.  
 4 2007); see also *Avocet Sports Tech., Inc. v. Garmin Int’l, Inc.*, 2012 U.S. Dist.  
 5 LEXIS 51650, at \*8 (N.D. Cal. Mar. 22, 2012) (same). Courts within the Ninth  
 6 Circuit are divided as to whether a claim for direct patent infringement must be  
 7 pleaded to meet *Twombly/Iqbal*’s plausibility standard, or whether a shorter  
 8 statement that follows Form 18 in the Appendix to the Federal Rules of Civil  
 9 Procedure may suffice. *Avocet Sports*, 2012 U.S. Dist. LEXIS 51650, at \*8-10  
 10 (noting the split of authority and holding that the better rule is to require a pleading  
 11 that satisfies *Twombly/Iqbal*); *Proxyconn Inc. v. Microsoft Corp.*, 2012 U.S. Dist.  
 12 LEXIS 70614, at \*8-11 (C.D. Cal. May 16, 2012) (“The Court is persuaded by those  
 13 authorities which hold that threadbare recitations of the language in Form 18 is no  
 14 longer sufficient to state a claim. As those other courts eloquently explain, ‘the  
 15 forms purporting to illustrate what level of pleading is required do not reflect the sea  
 16 change of *Twombly* and *Iqbal*.’”); *Wistron Corp. v. Phillip M. Adams & Assocs.,*  
 17 *LLC*, 2011 U.S. Dist. LEXIS 102237 (N.D. Cal. Sept. 12, 2011) (same); *Ziptronix,*  
 18 *Inc. v. Omnivision Techs., Inc.*, 2011 U.S. Dist. LEXIS 129275, at \*12 (N.D. Cal.  
 19 Nov. 8, 2011) (referring to Form 18 and ruling that a method patent claim that “set  
 20 forth none of the steps of Plaintiff’s alleged infringing method” and “contain[ed] no  
 21 allegation that all steps and stages of their protected process have been used by  
 22 Plaintiff” was insufficient).<sup>2</sup> Additional authority cited, *post*.

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23  
 24 <sup>2</sup> In *In re Bill of Lading Transmission and Processing System Patent Litigation*,  
 25 the Federal Circuit applied the pleading standard suggested by Form 18 while noting  
 26 that “[i]t will not always be true that a complaint which contains just enough  
 27 information to satisfy a governing form will be sufficient under *Twombly* and its  
 28 progeny. Resolution of that question will depend upon the level of specificity  
 required by the particular form, the element of the cause of action as to which the  
 (footnote continued)

As explained herein, under either potentially applicable pleading standard, McRO's complaint fails to give meaningful notice of the nature of the claims asserted against Insomniac and thus does not satisfy Rule 8.

**B. The Complaint Fails to Satisfy *Twombly* and *Iqbal*'s Pleading Standard, or Even the Minimal Pleading Form Suggested by Form 18 in the Appendix to the Federal Rules**

The complaint contains no substantive allegations that put Insomniac on notice of the games and related conduct that may be targeted by this litigation—asserting only that “video and/or computer games” allegedly use the methods claimed in the Patents-in-Suit (which themselves are not stated in the complaint). (Compl. ¶¶ 11, 14, 18.)

As *Proxyconn*, *Avocet Sports*, *Wistron* and *Ziptronix* have explained, “threadbare recitations” of the elements of a cause of action, unaccompanied by even the identification of an accused product, are insufficient to state a claim for direct patent infringement. *Proxyconn*, 2012 U.S. Dist. LEXIS 70614, at\*10. Additional authorities from within this Circuit support a pleading requirement that includes a “short and plain” statement of facts showing a plausible right to relief, as *Twombly* and *Iqbal* require. See, e.g., *Medsquire LLC v. Spring Med. Sys.*, 2011 U.S. Dist. LEXIS 107416 (C.D. Cal. Aug. 31, 2011); *Hsiu Pen Yang v. Winjet Auto., Inc.*, 2010 U.S. Dist. LEXIS 141974 (C.D. Cal. Oct. 22, 2010); *Smartmetric Inc. v. MasterCard Inc.*, 2010 U.S. Dist. LEXIS 141976 (C.D. Cal. July 8, 2010).<sup>3</sup>

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facts plead are allegedly inadequate, and *the phrasing of the complaint being challenged.*” 681 F.3d 1323, fn. 6 (Fed. Cir. 2012) (emphasis added).

<sup>3</sup> See also *Lantiq N. Am., Inc. v. Ralink Tech. Corp.*, 2011 U.S. Dist. LEXIS 70405, at \*19-22 (N.D. Cal. June 30, 2011) (explaining that “Plaintiffs must do more than conclusorily allege the means by which Defendants are infringing on the [patents-in-suit]” and holding that the “broad categories of products listed in the Complaint” are insufficient to put defendants on notice: “Plaintiffs must provide more specific identification of the products in any given category that are allegedly

(footnote continued)

1 The rationale for requiring more than threadbare conclusions applies with  
 2 equal force to a complaint that alleges infringement of a patent's method claims.  
 3 See *Proxyconn*, 2012 U.S. Dist. LEXIS 70614, at \*8-11 (dismissing method claim  
 4 for failure to identify any accused product for which the method allegedly was used,  
 5 or facts suggesting that the steps in the method were practiced by defendant);  
 6 *Ziptronix*, 2011 U.S. Dist. LEXIS 129275, at \*9-12 (same). *Ziptronix* explained:

7 The third element of Form 18 involves allegations of  
 8 infringement by, among other means, "using" the patent.  
 9 "Use" of a patented method or process is fundamentally  
 10 different from "use" of a patented system or device. . . .  
 11 Thus, with a method patent infringement claim, to  
 12 properly allege "use" of the patent, the patentee must  
 13 identify the steps of the claimed infringing process that  
 14 allegedly violated the protected method and must allege  
 15 that all the protected steps have been used by the  
 16 infringer. . . . Although Defendants contend they assert  
 17 method claims, *they have set forth none of the steps of*  
 18 *Plaintiff's alleged infringing method*. Moreover, their  
 19 counterclaims *contain no allegation that all steps and*  
 20 *stages of their protected process have been used* by  
 21 Plaintiff. Consequently, Defendants' claims of direct  
 22 infringement *are insufficient to provide Plaintiff with*  
 23 *notice of the alleged infringement*. . . .

24 *Id.* (emphasis added; citations omitted).

25 Even the decisions that accept Form 18's pleading example as sufficient post-  
 26 *Iqbal* acknowledge that, at minimum, a plaintiff must identify a targeted product, or  
 27 reasonably delineated category of products, to give "fair notice" of the nature of the  
 28 claims being made. See, e.g., *Acco Brands USA LLC v. Hewlett Packard Co.*, 2011

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infringing Plaintiffs' patents."); *Bender v. LG Elecs. U.S.A., Inc.*, 2010 U.S. Dist.  
 LEXIS 33075 (N.D. Cal. Mar. 11, 2010) (same).

1 U.S. Dist. LEXIS 67420, at \*5 (C.D. Cal. June 23, 2011) (even if Form 18  
 2 controlled, alleging the defendant’s “products” infringe is insufficient to give fair  
 3 notice of the claims).<sup>4</sup> Indeed, Form 18 itself refers to the defendant’s “electric  
 4 motors”—a significantly narrow category than “video and/or computer games” is  
 5 for a videogame company. *Infineon Techs.*, 2012 U.S. Dist. LEXIS 169959, at \*6  
 6 (quoting Form 18).

7 Again, McRO’s complaint fails to give meaningful notice to Insomniac of the  
 8 nature of McRO’s claims or the products or activities by Insomniac that are likely to  
 9 be at issue in this litigation. The complaint merely states in circular fashion—as  
 10 McRO did for 15 other defendants sued on the same date—that a videogame  
 11 company makes, sells or advertises videogames, and that the unspecified  
 12 videogames or advertising use methods covered by McRO’s patents. Rule 8 and  
 13 principles of fairness to the defendant require more.

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18  
 19 <sup>4</sup> Compare also *Superior Indus., LLC v. Thor Global Enters.*, 700 F.3d 1287  
 20 (Fed. Cir. 2012) (applying Form 18 pleading standard and holding that complaint  
 21 was sufficient where it identified accused “telescoping conveyor” and model  
 22 numbers for the accused product); *Creagri, Inc. v. Pinnaclife Inc.*, 2013 U.S. Dist.  
 23 LEXIS 427 (N.D. Cal. Jan. 1, 2013) (holding that complaint sufficiently pleaded  
 24 direct infringement of a method claim where it identified a specific product,  
 25 “miracle Olivamine Essential,” for which defendant used the patented method);  
 26 *Infineon Techs. AG v. Volterra Semiconductor Corp.*, 2012 U.S. Dist. LEXIS  
 27 169959 (N.D. Cal. Nov. 29, 2012) (complaint satisfied Form 18 where it identified  
 28 the accused “VT 115MF” master controller product); *Conte v. Jakks Pac., Inc.*, 2012  
 U.S. Dist. LEXIS 85017 (E.D. Cal. June 19, 2012) (complaint gave sufficient notice  
 and complied with Form 18 where it identified defendant’s “Hide ‘N Seek Care  
 Bear” and the corresponding elements that embody plaintiff’s invention).

1 **IV. CONCLUSION**

2 For the reasons discussed herein, Insomniac's motion should be granted.

3  
4 Dated: February 4, 2013

Respectfully submitted,

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